RECORD AND BRIEFS

No. 16-111

Supreme Court, U.S.
FILED
OCT 30 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., *et al.*,

Petitioners,

—v.—

COLORADO CIVIL RIGHTS COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF COLORADO

BRIEF FOR TANENBAUM CENTER FOR INTERRELIGIOUS UNDERSTANDING AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DANIEL LAWRENCE GREENBERG
Counsel of Record

ROBERT J. WARD
HOLLY H. WEISS
JENNIFER M. OPHEIM
RANDALL ADAMS
MARK GARBYAN
BRIAN LANCIAULT

SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, New York 10022
(212) 756-2000
daniel.greenberg.srz.com

Attorneys for Amicus Curiae Tanenbaum Center for Interreligious Understanding

QUESTION PRESENTED

Whether the Colorado Court of Appeals correctly held that Colorado's public accommodations law, Colo. Rev. Stat. § 24-34-601(2)(a) (2016), does not offend the Free Exercise Clause of the United States Constitution.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

INTEREST OF *AMICUS* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. PUBLIC ACCOMMODATIONS LAWS FURTHER THE INTERESTS PROTECTED BY THE FREE EXERCISE CLAUSE 5

A. Anti-Discrimination Laws Like CADA Are an Important Part of the Legal Fabric of Our Country 6

B. Anti-Discrimination Laws Serve the Same Interests As the Free Exercise Clause 10

II. A RULING FOR PETITIONERS WOULD UNDERMINE FREE EXERCISE PROTECTIONS 12

A. The Free Exercise Clause Is Not a License to Discriminate Against Others in the Public Sphere, as this Court Has Consistently Held 13

B. Petitioners' Proposed Exception to CADA Could Result in Discrimination Against Individuals Because of Their Religion 17

PAGE

III. APPLICATION OF CADA ON THE PRESENT FACTS IS NOT A FREE EXERCISE VIOLATION 19

A. CADA Survives the *Smith* Rational Basis Test 19

B. CADA Survives Strict Scrutiny 21

CONCLUSION 24

TABLE OF AUTHORITIES

PAGE(S)

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200, 115 S. Ct. 2097 (1995) 16

Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,
481 U.S. 537, 107 S. Ct. 1940 (1987) 21

Bob Jones Univ. v. United States,
461 U.S. 574, 103 S. Ct. 2017 (1983) 15

Bowen v. Roy,
476 U.S. 693, 106 S. Ct. 2147 (1986) 5, 11

Burson v. Freeman,
504 U.S. 191, 112 S. Ct. 1846 (1992) 22

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520, 113 S. Ct. 2217
(1993) ..... *passim*

City of Boerne v. Flores,
521 U.S. 507, 117 S. Ct. 2157 (1997) 14

Craig v. Masterpiece Cakeshop, Inc.,
370 P.3d 272 (Colo. App. 2015) 20

Dole v. Shenandoah Baptist Church,
899 F.2d 1389 (4th Cir. 1990) 14, 16

EEOC v. Fremont Christian Sch.,
781 F.2d 1362 (9th Cir. 1986) 16

PAGE(S)

Elane Photography, LLC v. Willock,
309 P.3d 53 (N.M. 2013),
cert denied, 134 S. Ct. 1787,
188 L. Ed. 2d 757 (2014) 9, 20

Emp. Div., Dep't of Human Res. of Or. v. Smith,
494 U.S. 872, 110 S. Ct.
1595 (1990) ..... *passim*

Grace United Methodist Church v.
City of Cheyenne,
451 F.3d 643 (10th Cir. 2006) 20

Heart of Atlanta Motel v. United States,
379 U.S. 241, 85 S. Ct. 348 (1964) 3, 8, 21

McGowan v. Maryland,
366 U.S. 420, 81 S. Ct. 1153 (1961) 11

Micu v. City of Warren,
382 N.W.2d 823, 147 Mich. App. 573
(Mich. Ct. App. 1985), *lv. denied sub nom.*,
Bill v. Northwestern Nat. Life Ins. Co.,
389 N.W.2d 863, 425 Mich. 877
(Mich. 1986) 10

Minersville Sch. Dist. Bd. of Ed. v. Gobitis,
310 U.S. 586, 60 S. Ct. 1010 (1940) 14

Newman v. Piggie Park Enters. Inc.,
256 F. Supp. 941 (D.S.C. 1966),
rev'd in part on other grounds,
377 F.2d 433 (4th Cir. 1967), *aff'd and*
modified, 390 U.S. 400, 88 S. Ct. 964 15

Newman v. Piggie Park Enters. Inc.,
390 U.S. 400, 88 S. Ct. 964 (1968) 14, 15

PAGE(S)

Obergefell v. Hodges,
135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) 16

Prince v. Massachusetts,
321 U.S. 158, 64 S. Ct. 438 (1944) 15

Reynolds v. United States,
98 U.S. 145, 25 L. Ed. 244 (1878) 15

Roberts v. U.S. Jaycees,
468 U.S. 609, 104 S. Ct. 3244 (1984) 21

Swanner v. Anchorage Equal Rights Comm'n,
874 P.2d 274 (Alaska 1994), *cert. denied*, 513 U.S. 979,
115 S. Ct. 460 (1994) 10, 21, 22, 23

Telescope Media Group v. Lindsey,
Civ. No. 16-4094, 2017 WL 4179899
(D. Minn. Sept. 20, 2017).....20

United States v. Lee,
455 U.S. 252, 102 S. Ct. 1051 (1982) 14

West Virginia Bd. of Ed. v. Barnette,
319 U.S. 624, 63 S. Ct. 1178 (1943) 18

Statutes

42 U.S.C. § 2000a *et seq.*
(1964 Civil Rights Act Title II) 12

42 U.S.C. § 2000a(a).....6, 11

42 U.S.C. § 2000d..... 7

42 U.S.C. § 2000e *et seq*..... 7

42 U.S.C. § 3601 *et seq*..... 7

PAGE(S)

42 U.S.C. 12181 *et seq.*, Americans with Disabilities Act of 1990 13

Colo. Rev. Stat. Ann. § 24-34-502(1)(a) (West 2014) 7

Colo. Rev. Stat. § 24-34-301 *et seq.* (2016) Colorado Anti-Discrimination Act (CADA) ..... *passim*

Colo. Rev. Stat. § 24-34-601(1) (2016) 23

Colo. Rev. Stat. § 24-34-601(2)(a) (2016) 6

Minn. Stat. Ann. § 363A.02(1) (West 2017) 9

N.J. Stat. Ann. § 10:5-12(f) (West 2016) 7

N.Y. Exec. Law § 290 (McKinney 2017) 9

N.Y. Exec. Law § 296 *et seq.* (McKinney 2017) 7

New Mex. Stat. Ann. 1978, § 28-1-7(G) (West 2017) 7

Tenn. Code Ann. § 4-21-101(a) (West 2017) 9

Va. Code Ann. § 36-96.3(A) (West 2017) 7

Other Authorities

Dhooge, Lucien J., *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319 (2015) 6

PAGE(S)

H.R. COMM. ON THE JUDICIARY, H.R. REP. NO. 88-914 (1963) 7

Letter from James Madison to Edward Livingston (July 10, 1822), in 9 *The Writings of James Madison* 98 (Gaillard Hunt ed., 1901) 4, 14

Koppelman, Andrew, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (Mar. 2015) 8

McConnell, Michael W., *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) 4

Melling, Louise, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J. L. & GENDER 177 (2015) 16, 21

S. COMM. ON COMMERCE, S. REP. NO. 88-872 (1964) 7, 8, 11

State Laws on Employment-Related Discrimination, Nat'l Conf. of State Legis., http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx (last visited Oct. 16, 2017) 7

State Public Accommodation Laws, NAT'L CONF. OF STATE LEGIS. (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx 6

INTEREST OF *AMICUS*[1]

Tanenbaum Center for Interreligious Understanding ("Tanenbaum" or "Amicus") is a secular, non-sectarian organization dedicated to building a society in which mutual respect for different religious beliefs and practices is the norm in everyday life. In accord with these goals, Tanenbaum dedicates its resources to protecting religious pluralism and creating practical strategies for, among other things, combating religious harassment and discrimination in workplaces and public accommodations. The anti-discrimination law that is the subject of this case, and other laws like it, protect people using public accommodations from discrimination based on multiple characteristics, including their religious beliefs. Such anti-discrimination laws preserve and protect the religious pluralism and freedom of belief that Tanenbaum seeks to actualize. Tanenbaum submits this amicus brief because, in this important case which requires the Court to weigh core rights, it is Tanenbaum's view that the preservation of the government's ability to implement anti-discrimination laws to the fullest extent possible is critical to combating discrimination on the basis of religion, and to protecting and preserving the religious pluralism sanctified by the U.S. Constitution.

---

[1] This brief was prepared entirely by us and our counsel. No other person made any financial contribution to its preparation or submission. The consents of Petitioners and the Colorado Civil Rights Commission are on file with the Clerk, and Tanenbaum has separately received the consent of Respondents Craig and Mullins, which is being submitted herewith.

SUMMARY OF ARGUMENT

Petitioners—a bakery purportedly open to the public and the owner of the bakery—have advanced multiple First Amendment defenses seeking to justify their refusal to create a cake for a same-sex couple, notwithstanding that such refusal amounts to a plain violation of the Colorado Anti-Discrimination Act, Colo. Rev. Stat. § 24-34-301 *et seq.* (2016) ("CADA"). While Petitioners pose multiple theories to this Court in their quest to avoid being subject to CADA, objections which were rejected by the Colorado Court of Appeals, Tanenbaum takes issue in particular with Petitioners' request that the Court except them from public accommodations laws under the Free Exercise Clause of the U.S. Constitution. As set forth in their submissions to the Court, and in the briefs of the amici who support their position, Petitioners are seeking a ruling from the Court that would effectively nullify anti-discrimination laws on the basis that the Free Exercise Clause permits and authorizes discrimination against others in the name of religion.

Petitioners' argument purports to pit two important legal protections against one another: the Free Exercise Clause of the First Amendment, on the one hand, and public accommodations and similar anti-discrimination laws like CADA, on the other. Petitioners suggest that these two protections cannot be reconciled, and that anti-discrimination laws, specifically, CADA, must yield to the Free Exercise Clause. This exceedingly broad proposition, however, cannot be, and is not, correct.

First, anti-discrimination laws like CADA actualize the very values embodied in and motivating the Free Exercise Clause. As such, they have become part of the fabric of both state and federal law. Both anti-

discrimination laws and the Free Exercise Clause seek to preserve, among other things, religious freedom, freedom of conscience, religious pluralism and equality. Anti-discrimination laws like CADA advance these aims primarily by prohibiting public establishments from persecuting individuals based on their personal religious beliefs, among other things, and eliminating and "vindicat[ing] the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250, 85 S. Ct. 348, 354 (1964). In great measure, the Free Exercise Clause accomplishes these aims by prohibiting governmental persecution based on religious beliefs and, ultimately, laying the foundation for equality among various religious communities. Thus, although the Free Exercise Clause and anti-discrimination laws operate differently, at a fundamental level they seek consistent, compelling ends, and both are critical to preserving the core values underlying the U.S. Constitution and its protection for freedom of religion.

Second, Petitioners' position must be rejected because, essentially, Petitioners are asking this Court to unsheathe the Free Exercise Clause as a sword to be employed to undermine anti-discrimination laws and, ultimately, impair the very religious freedom that the Free Exercise Clause was adopted to protect. This approach is directly contrary to the well-established principle, and this Court's precedent adopting it, that free exercise properly may be limited to ensure "compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 1600 (1990); *see also*

Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1145 (1990) (drafters of the Bill of Rights recognized limitations on the "immunity of Religion from Civil Jurisdiction, in every case where it does not trespass on private rights or public peace") (quoting Letter from James Madison to Edward Livingston (July 10, 1822), in 9 *The Writings of James Madison* 98, 100 (Gaillard Hunt ed., 1901) [hereinafter "*Madison Letter*"]). Moreover, rather than protecting "believers' freedom to live out their religious identity in the public square," *see* Pet. Br. at 16, a rule that authorizes invocation of the Free Exercise Clause as justification for discrimination would, with constitutional imprimatur, allow an individual, on the basis of their religious beliefs, to discriminate against others because of the other's religion or creed. Perhaps unwittingly, Petitioners have thereby left themselves vulnerable; the same justification they advance today, if successful, may very well be used to justify future acts of discrimination against them precisely because of their religious beliefs. While Petitioners apparently endorse this result, this Court must not.

Finally, and unsurprisingly in light of the foregoing, whether analyzed under this Court's rational basis test or the strict scrutiny test, compelling Petitioners to comply with CADA is entirely consistent with the U.S. Constitution.

For the foregoing reasons, we urge the Court to affirm the Colorado Court of Appeals' decision as it relates to the Free Exercise Clause.

ARGUMENT

I. PUBLIC ACCOMMODATIONS LAWS FURTHER THE INTERESTS PROTECTED BY THE FREE EXERCISE CLAUSE.

Public accommodations laws, including CADA and others that have been adopted by forty-five states, the District of Columbia, and the federal government, are designed to guarantee protections for individuals, including those exercising their religious beliefs. The policies and purposes underlying these laws are the elimination of invidious discrimination, and the promotion of individual freedom, liberty and equality. They accomplish these goals by ensuring equal economic and social opportunity and access, thereby removing the stigma of the second-class citizenship that results from being subjected to discriminatory acts in everyday life based on, among other things, religion.

Likewise, this Court has long recognized that, historically, the elimination of religious persecution (*i.e.*, discrimination based on religion) was a foundational premise of the drafters of the Free Exercise Clause. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 2226 (1993); *Bowen v. Roy*, 476 U.S. 693, 703, 106 S. Ct. 2147, 2154 (1986).

The Free Exercise Clause and public accommodations laws are, then, convergent; both are designed to preserve individual liberty and freedom by protecting Americans from the indignity of being persecuted simply because they hold different beliefs (or, in the case of many public accommodations laws, because they are of different races, genders or sexual orientation, etc.). Petitioners' Free Exercise argument

overlooks this reality, and posits instead a rule that is boundless in its appetite to undermine the efficacy of such laws nationwide, severely undermining freedom from religious persecution.

A. Anti-Discrimination Laws Like CADA Are an Important Part of the Legal Fabric of Our Country.

CADA declares that "it is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . creed . . . [or] sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." § 24-34-601(2)(a), Colo. Rev. Stat. (2016).[2] Twenty-one other states and the District of Columbia have enacted public accommodations statutes prohibiting discrimination because of sexual orientation, *see* Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319, 325 n. 24 (2015) (collecting statutes), and forty-five states, plus the District of Columbia and the federal government, prohibit discrimination in public accommodations based on religion. *See, e.g.*, 42 U.S.C. § 2000a(a); *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGIS. (July 13, 2016) (describing state statutes), *available*

---

[2] "Creed" is not defined in the statute. Webster's Dictionary defines "creed" as "a brief authoritative formula of religious belief" or "a set of fundamental beliefs, a guiding principle." *Creed*, MERRIAM WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/creed (last visited Oct. 24, 2017).

at http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

Anti-discrimination laws are not limited to protections in public accommodations. States also have enacted them to prohibit discrimination in areas such as employment[3] and housing.[4] And the federal government has also adopted laws prohibiting discrimination in employment, housing and education. *See, e.g.*, 42 U.S.C. § 2000e *et seq.* (employment); 42 U.S.C. § 3601 *et seq.* (housing); 42 U.S.C. § 2000d (education).

The animating policy behind these laws is illustrated in the legislative history of the Civil Rights Act of 1964. *See* H.R. COMM. ON THE JUDICIARY, H.R. REP. NO. 88-914 (1963). Congress viewed such laws as necessary to "redress . . . denials of equal protection of the laws on account of race, color, religion, or national origin" and "to meet an urgent and most serious national problem." *Id.* at 18. As the Senate Committee on Commerce observed, "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." S. COMM. ON COMMERCE, S. REP. NO. 88-872, at 16 (1964). The goal of the Act was therefore "to remove the daily affront and

---

[3] *See State Laws on Employment-Related Discrimination*, Nat'l Conf. of State Legis., http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx (last visited Oct. 16, 2017) (aggregating state employment discrimination laws).

[4] *See, e.g.*, N.Y. Exec. Law § 296 *et seq.* (McKinney 2017); N.J. Stat. Ann. § 10:5-12(f) (West 2016); Colo. Rev. Stat. Ann. § 24-34-502(1)(a) (West 2014); Va. Code Ann. § 36-96.3(A) (West 2017); New Mex. Stat. Ann. 1978, § 28-1-7(G) (West 2017); Wisc. Stat. Ann. § 106.50 (West 2017).

humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." H.R. REP. NO. 88-914, at 18.

Indeed, anti-discrimination laws create a more egalitarian society, where the personal dignity of those perceived to be "different" because of their beliefs, gender, skin color or sexual orientation, is protected. *See* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 639-53 (Mar. 2015) (describing anti-discrimination laws as "ameliorate[ng] . . . economic inequality," redressing "insult [and] dignitary harm" that accrues when "one is in danger of losing real and important economic opportunities," and "eliminat[ing] patterns of stigma and prejudice that constitute some classes of persons as inferior members of society"); *see also Heart of Atlanta Motel*, 379 U.S. at 286, 85 S. Ct. at 373 (Douglas, J. concurring) (Title II of the 1964 Civil Rights Act "put[s] an end to all obstructionist strategies and allow[s] every person—whatever his race, creed, or color—to patronize all places of public accommodation without discrimination").

Anti-discrimination laws not only prevent invidious discrimination, but they also secure individual freedom. *See* S. REP. NO. 88-872, at 22. In its report on the Civil Rights Act of 1964, the Senate Committee on Commerce observed as much:

> [I]n order to assure that the institution of private property serves the end of individual freedom and liberty it has been restricted in many instances. The most striking example of this is the abolition of slavery. Slaves were treated as items of private property, yet surely no man dedicated to the cause of

> individual freedom could contend that individual freedom and liberty suffered by emancipation of the slaves . . . Nor can it be reasonably argued that racial or religious discrimination is a vital factor in the ability of private property to constitute an effective vehicle for assuring personal freedom. The pledge of this Nation is to secure freedom for every individual; that pledge will be furthered by [public accommodations laws.]

Id. at 22-23.

States have endorsed parallel policy interests in adopting anti-discrimination laws, recognizing their value in preserving human dignity and promoting individual liberty and equal participation of individuals in society. *See, e.g.*, Tenn. Code Ann. § 4-21-101(a) (West 2017) ("It is the purpose and intent of the general assembly to . . . [s]afeguard all individuals within the state from discrimination . . . in connection with employment and public accommodations . . . [and] protect their interest in personal dignity and freedom from humiliation"); N.Y. Exec. Law § 290 (McKinney 2017) ("the legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such . . . menaces the institutions and foundation of a free democratic state"); Minn. Stat. Ann. § 363A.02(1) (West 2017) ("[i]t is the public policy of [Minnesota] to secure for persons in this state, freedom from discrimination . . . such discrimination threatens the rights and privileges of the inhabitants of this state"). State courts have, likewise, approved of these policy aims. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013) (New Mexico's "intent to

prevent discrimination" services a "strong state policy of promoting equality for its residents"), *cert denied*, 134 S. Ct. 1787, 188 L. Ed. 2d 757 (2014); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (anti-discrimination laws curb "discrimination that degrades individuals, affronts human dignity, and limits one's opportunities"), *cert. denied*, 513 U.S. 979, 115 S. Ct. 460 (1994); *Micu v. City of Warren*, 382 N.W.2d 823, 827, 147 Mich. App. 573, 582 (Mich. Ct. App. 1985) ("civil rights legislation has traditionally been enacted to enable individuals to have access to opportunity based upon individual merit and qualifications and to prohibit decisions based upon irrelevant characteristics"), *lv. denied sub nom., Bill v. Northwestern Nat. Life Ins. Co.*, 389 N.W.2d 863, 425 Mich. 877 (Mich. 1986).

Public accommodations laws like CADA, and anti-discrimination laws generally, promote the compelling interests of individual dignity, freedom, opportunity and equality, by prohibiting persecution based on differences, including differences in religious beliefs, gender, race and sexual orientation.

B. Anti-Discrimination Laws Serve the Same Interests As the Free Exercise Clause.

At their core, the foregoing goals of anti-discrimination laws are the same goals of the Free Exercise Clause. Just as anti-discrimination laws promote freedom and equality in societal participation, free of stigmatization, the Free Exercise Clause promotes religious pluralism, preserving the freedom to hold one's religious beliefs safely and without persecution, and establishing equality of rights among the various religious communities. *See Madison Letter* (noting "the equality of all Religious Sects in the eye of the Constitution"). As this Court has

observed, "it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'" *Church of Lukumi*, 508 U.S. at 532, 113 S. Ct. at 2226 (quoting *Bowen*, 476 U.S. at 703, 106 S. Ct. at 2154); *see also McGowan v. Maryland*, 366 U.S. 420, 464, 81 S. Ct. 1153, 1155 (1961) ("[i]n assuring the free exercise of religion, the Framers of the First Amendment were sensitive to the then recent history of those persecutions").

The legislative history of the Civil Rights Act of 1964 (and many other anti-discrimination laws) confirms that preventing religious discrimination has been a core driver of such statutes. Indeed, it was squarely in Congress' view when it adopted that anti-discrimination law. *See, e.g.*, H.R. REP. NO. 88-914 at 18 (public accommodations law would advance "redress of denials of equal protection of the laws on account of race, color, *religion*, or national origin") (emphasis added); S. REP. NO. 88-872 at 77 (Statement of Sen. Cotton) (observing that "[d]iscrimination because of race or religion is abhorrent to all right thinking men and repugnant to the basic principles of our Republic"). In fact, Congress further protected the cause of the Free Exercise Clause when it expressly prohibited discrimination based on religion in public accommodations (and elsewhere). *See, e.g.*, 42 U.S.C. § 2000a(a). By including religion in these statutes, Congress revealed a clear legislative intent to adopt laws to properly advance and preserve the free exercise principles imbedded in the U.S. Constitution—including the individual liberty of religious persons who might otherwise face persecution because of their beliefs. *See* S. REP. NO. 88-872 at 22-23 ("Nor can it be reasonably argued that racial or *religious* discrimination is a vital factor in the ability of private

property to constitute an effective vehicle for assuring personal freedom") (emphasis added).

Clearly, the Free Exercise Clause and public accommodations (and, more generally, anti-discrimination) laws are mutually reinforcing and designed to function together to achieve the same interests—individual liberty and equality. As such, insofar as Petitioners urge that the foundational policies underlying the Free Exercise Clause are compelling, they cannot be heard to argue in the same breath that the anti-discrimination laws—which give life to those policies—are not. There can be no argument but that the multitude of anti-discrimination laws, like CADA, and those adopted by state and federal legislatures across the country, preserve the underlying values and rights imbedded in the Free Exercise Clause.

II. A RULING FOR PETITIONERS WOULD UNDERMINE FREE EXERCISE PROTECTIONS.

Petitioners argue for an exception from CADA and, in so doing, are asking this Court to permit them, and ultimately others, to engage in discrimination justified by their religious beliefs. The scope of such an exception could very well impact the panoply of public accommodations and anti-discrimination laws described above.[5] For good reason, similar arguments

---

[5] *See, e.g.*, Br. United States Amicus Curiae Supporting Pet'rs at 1 ("The United States has a substantial interest in the preservation of constitutional rights of free expression. It also has a substantial interest in the application of such rights in the context of the state statute here, which shares certain features with federal public accommodations laws, including Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, and Title

have been rejected previously. In addition, Petitioners' proposed exception invites discrimination justified by one person's religion, not only against same-sex couples, but also, among other things, against those of differing faiths. As set forth above, this result would ultimately be contrary to the precise aim of the Free Exercise Clause and stands to undermine our Constitution's fundamental commitment to individual liberty and equality.

A. The Free Exercise Clause Is Not a License to Discriminate Against Others in the Public Sphere, as this Court Has Consistently Held.

Petitioners' Free Exercise argument boils down to the proposition that, insofar as religious beliefs conflict with the anti-discrimination laws described above, those anti-discrimination laws must, as a constitutional matter, give way to the exercise of those religious beliefs. Thus, according to Petitioners' position, if a male business owner has a sincerely held religious belief that women should remain in the home and not in the workplace, the Free Exercise Clause would require laws prohibiting employment discrimination on the basis of gender to be deemed unconstitutional. Or, if a religious restaurant owner has a sincerely held religious belief that he or she cannot serve atheists or others who subscribe to other religions, public accommodations laws prohibiting discrimination on the basis of religion must be deemed unconstitutional. Or, if, as has been the case in the past, a person has a sincerely held religious belief that interracial-marriage is a sin and should not be condoned, anti-discrimination laws prohibiting

---

III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12181 *et seq.*")

discrimination on the basis of race must be deemed unconstitutional. The gist of Petitioners' argument is, unfortunately, not novel. It has, however, been consistently rejected by this Court and others. *See, e.g., Newman v. Piggie Park Enters. Inc.*, 390 U.S. 400, 402 n. 5, 88 S. Ct. 964, 966 (1968); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990).

The principle that the free exercise of religion can be subject to regulation, notwithstanding the sincerity with which the religious belief is held, is, in fact, well-established as both a point of history and by this Court's precedent. Writing in 1822, James Madison lauded "the immunity of Religion from Civil Jurisdiction, in every case *where it does not trespass on private rights or public peace.*" *Madison Letter* (emphasis added). In her dissent in *City of Boerne v. Flores*, Justice O'Connor expounded on the historical background supporting the proposition that the free exercise of religion may be subject to regulation where, quoting Madison, "under color of religion[,] the preservation of equal liberty, and the existence of the State be manifestly endangered." 521 U.S. 507, 556, 117 S. Ct. 2157, 2181 (1997) (internal citation omitted).

This Court has consistently adhered to this principle. *See Smith*, 494 U.S. at 879, 110 S. Ct. at 1600 ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious belief" (quoting *Minersville Sch. Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-95, 60 S. Ct. 1010, 1013 (1940))); *United States v. Lee*, 455 U.S. 252, 261, 102 S. Ct. 1051, 1057 (1982) ("[w]hen followers of a particular sect enter into commercial activity as a

matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity"); *Prince v. Massachusetts*, 321 U.S. 158, 167, 64 S. Ct. 438, 442 (1944) ("the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare[] and that includes, to some extent, matters of conscience and religious conviction"); *Reynolds v. United States*, 98 U.S. 145, 166-67, 25 L. Ed. 244 (1878) ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

Indeed, this Court and lower courts have specifically rejected the idea that religious liberty is a justification for discrimination in other contexts. For example, this Court characterized an effort to rely on religious liberty to justify racial discrimination as "patently frivolous." *See Newman*, 390 U.S. at 402 n. 5, 88 S. Ct. at 966; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 604, 103 S. Ct. 2017, 2035 (1983) (school with policy prohibiting interracial dating and marriage had no free exercise defense to loss of tax-exempt status); *Newman v. Piggie Park Enters. Inc.*, 256 F. Supp. 941, 955 (D.S.C. 1966) (while franchise owner "has a constitutional right to espouse the religious beliefs of his choosing . . . he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens"), *rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified*, 390 U.S. 400, 88 S. Ct. 964. Likewise, sex-based discrimination justified on religious liberty

grounds has also been squarely rejected. *See Dole*, 899 F.2d at 1392 (holding that there is no free exercise exemption from federal statute requiring equal pay for men and women); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) ("head of household" religious belief did not justify providing unequal health benefits to female employees).

Petitioners are, in effect, asking this Court to overrule or distinguish the foregoing precedent. But no such distinction can appropriately be made. Laws such as CADA are directly aimed at eradicating the same dignitary harm and stigmatization of persons who, because of some core characteristic, are treated as second-class and, therefore, unequal citizens.

While some of the amici supporting Petitioners' position suggest there is a difference between race and sexual orientation in light of the historical suffering of racial minorities, it is that history which teaches us that harm to individual dignity and the stigmatization of individuals as second-class is unquestionably incompatible with the promise of equality for all enshrined in our Constitution. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2608, 192 L. Ed. 2d 609 (2015) (same-sex couples "ask for equal dignity in the eyes of the law [and t]he Constitution grants them that right"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214, 115 S. Ct. 2097, 2106 (1995) ("[d]istinctions between citizens because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality") (citation and quotations omitted); *see also* Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J. L. & GENDER 177, 184 (2015). The fact that our civil society has advanced a step forward

in recent decades does not justify taking two giant steps back. If this Court were to now "enshrine[e] pockets of discrimination against LGBT people in our laws, where the law has not done so elsewhere, [it would] create a second-class equality," *see id.* at 185, and a gaping hole in anti-discrimination laws.

Simply put, Petitioners' argument is inconsistent with the values enshrined in our Constitution, values that both the Free Exercise Clause and public accommodations laws seek to protect. Petitioners' argument, which would essentially allow discrimination "under color of religion," endangers, among other things, equal liberty of same-sex couples and, if endorsed by the Court, could be wielded to harm persons of other religions, races, and genders. Such pernicious employment of religious liberty ought not be accepted, either as a matter of principle or as a matter of precedent.

B. Petitioners' Proposed Exception to CADA Could Result in Discrimination Against Individuals Because of Their Religion.

As described in Part I, *supra*, the Free Exercise Clause was adopted to protect against religious persecution. Petitioners would now invite that very persecution.

Unfortunately, this concern is neither ephemeral nor remote. To the contrary, it is concrete and, bewilderingly, advocated for by Petitioners and the amici who support them. In fact, Petitioners have apparently already adopted a practice of refusing to serve individuals because of their religious beliefs. *See* Pet. Br. at 9 ("Phillips will not design cakes that celebrate . . . or promote atheism"). Without question, such an unequivocal assertion—in which another religious (or non-religious) belief is subordinated to

one's own—contradicts the fundamental interests underlying the very constitutional provision that purportedly justifies it. *See West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 653, 63 S. Ct. 1178, 1192 (1943) (Frankfurter, J. dissenting) ("The great leaders of the American Revolution were determined to . . . put on an equality the different religious sects . . . Religious minorities as well as religious majorities were to be equal").

The amici supporting the result Petitioners advocate take the position further. By way of example, the National Jewish Commission on Law and Public Affairs ("NJCLPA") posits, as an outcome of a victory for Petitioners, an example in which a Jewish limousine driver could refuse to provide services to persons attending a different religion's ceremony. Br. Amicus Curiae NJCLPA at 8. Similarly, the United States Conference of Catholic Bishops advocate for the ability of a Jewish florist to properly refuse service to a person converting to another religion. Br. Amicus Curiae United States Conference Catholic Bishops, *et al.*, at 24. Indeed, the record is replete with amici supporting Petitioners' position and then offering instances in which a finding for Petitioners would make it "proper" to discriminate against a myriad of individuals because of their religion. *See, e.g.*, Br. Amicus Curiae Freedom X and Rabbi Dovid Bressman at 3-4, 16 (suggesting Jewish scribes may be able to refuse to sell Torah scrolls to non-Jews); Br. Amicus Curiae Agudath Israel America at 3, 7 (Jewish caterers would not need to service inter-faith marriages between a Jew and non-Jew).

Petitioners' Free Exercise argument is not inherently limited to the prioritization of religious beliefs in the context of weddings or so-called

"expressive" conduct, nor is it limited in any way to discrimination on the basis of sexual orientation, as Petitioners' amici amply demonstrate. Likewise, the risk posed by this position is not confined to Colorado and CADA, but would readily extend far beyond that state to the various state and federal laws referenced in Part I.A., *supra*. A reversal of this Court's precedent to allow for discrimination when one justifies such discrimination on the basis of religious beliefs threatens a sea-change in anti-discrimination laws, to the detriment of liberty, equality, human dignity and religious freedom itself.

III. APPLICATION OF CADA ON THE PRESENT FACTS IS NOT A FREE EXERCISE VIOLATION.

Petitioners and their amici make much of whether to apply the *Smith* test or a more exacting, strict scrutiny test in this case, but to no effect. Whichever test is employed, CADA and its application in this case survive.

A. CADA Survives the *Smith* Rational Basis Test.

As an initial matter, despite Petitioners' strained arguments to the contrary, there can be little question but that CADA is a neutral and generally applicable statute. Petitioners have presented no evidence that the object of CADA, either on its face or as applied, is to "infringe upon or restrict practices because of their religious motivation." *Church of Lukumi*, 508 U.S. at 533, 113 S. Ct. at 2227. CADA prohibits discrimination on the basis of sexual orientation (and other identifiers), regardless of the source of such discrimination. The law is, therefore, neutral. *See id.* Likewise, Petitioners have pointed to no evidence that CADA has been applied in a manner

that allowed discrimination because of sexual orientation, when the justification for that discrimination was a secular or other, non-Christian, belief. As such, the law is generally applicable. *See id.* at 534. Indeed, courts analyzing similar statutes have concluded that those anti-discrimination laws were also neutral and generally applicable. *See Elane Photography*, 309 P.3d at 73-75; *Telescope Media Group v. Lindsey*, Civ. No. 16–4094 (JRT/LIB), 2017 WL 4179899, at *21 (D. Minn. Sept. 20, 2017) (finding Minnesota's public accommodations statute neutral and generally applicable where "the law affects all discriminatory acts carried out in public accommodations and contracting, whether motivated by religion or something else").

Because CADA is neutral and generally applicable, the Court need only conclude that it is "rationally related to a legitimate governmental interest in order to survive a constitutional challenge." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006) (relying on *Smith*, 494 U.S. at 879, 110 S. Ct. at 1600). Here, Colorado has a legitimate interest in eliminating discrimination in places of public accommodation, an interest shared by forty-five states, the District of Columbia, and the federal government. It is, moreover, well-established that public accommodations laws, like CADA, further that interest. Indeed, as the Colorado Court of Appeals noted, this Court "has consistently recognized that states have a compelling interest in eliminating . . . discrimination [in places of public accommodation] and that statutes like CADA further that interest." *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 293 (Colo. App. 2015) (citing cases). As such, CADA does not violate the Free Exercise Clause under the rational basis test.

B. CADA Survives Strict Scrutiny.

Under the strict scrutiny test advocated by Petitioners, CADA must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *See Church of Lukumi*, 508 U.S. at 546, 113 S. Ct. at 2233.

With respect to the first prong of this test, this Court previously recognized that public accommodations laws serve compelling state interests of the highest order in the eradication of discrimination. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S. Ct. 1940, 1948 (1987) ("public accommodations laws plainly serv[e] compelling state interests of the highest order"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, 104 S. Ct. 3244, 3253 (1984) (Minnesota public accommodations law reflects "[s]tate's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services" and "plainly serves compelling state interests of the highest order"). Indeed, as described at length above, public accommodations laws, such as CADA, "vindicate[] 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel*, 379 U.S. at 250, 85 S. Ct. at 354. They further the government's interests in curbing "discrimination that degrades individuals, affronts human dignity, and limits one's opportunities." *Swanner*, 874 P.2d at 283. They promote equality. *See* Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J. L. & GENDER at 189 ("The promise of equality is not real or robust if it means you can be turned away"). And they prohibit singular acts of discrimination, which, even when the victim ultimately finds alternative accommodation, are "view[ed]" by

the government as "independent social evils" that ought to be stymied. *Swanner*, 874 P.2d at 283.

That public accommodations laws, such as CADA, are necessary to serve the foregoing interests is plain. Indeed, as set forth in Part I.A., *supra*, forty-five states, the District of Columbia, and the federal government have passed similar laws seeking to protect such interests, with twenty-one states having passed public accommodations laws specifically including sexual orientation within their protections from discrimination. *Cf. Burson v. Freeman*, 504 U.S. 191, 206, 112 S. Ct. 1846, 1855 (1992) (concluding that the fact that all 50 states had passed election regulations limiting access to areas around polls demonstrated that such regulations were necessary to serve the state's compelling interests).

Petitioners nevertheless argue that CADA is not narrowly tailored, and therefore does not pass constitutional muster, because "less restrictive alternatives are available to achieve" Colorado's compelling state interest, and that granting Petitioners an exemption from CADA would not "undercut the interests" that Colorado seeks to achieve. Pet. Br. at 16, 58. This argument simply makes no sense. Uniform administration of anti-discrimination laws is narrowly tailored and essential to furthering a state's compelling interest to combat discrimination. *See Smith*, 494 U.S. at 905, 110 S. Ct. at 1614 (O'Connor, J. concurring in judgment) ("[U]niform application of Oregon's criminal probation is essential to accomplish its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance.") (citation and quotations omitted).

The Colorado legislature has carefully crafted an exemption for places that are "principally used for religious purposes" to prevent the statute from becoming over-inclusive and swallowing the free exercise rights of religious entities protected by the First Amendment. *See* Colo. Rev. Stat. § 24-34-601(1) (2016). This represents a narrowly tailored framework. Grafting additional, judicially created, exemptions from CADA and thereby permitting such exemptions in similar anti-discrimination laws covering places of public accommodation, such as bakeries, florists, photography studios, tailors, banquet halls, restaurants, hair salons, and so forth, is not consistent with the fundamental goals of anti-discrimination laws. Such exemptions would swing the pendulum in such a manner as to undermine the uniformity necessary to eradicate discrimination. *See Swanner*, 874 P.2d at 283 ("[T]he government's transactional interest in preventing . . . discrimination . . . will clearly suffer if an exemption is granted to accommodate the religious practice at issue") (citations and quotations omitted).

In short, whether CADA is analyzed under the *Smith* test or the more exacting strict scrutiny test, the law is narrowly tailored to serve the compelling interest of eradicating invidious discrimination. More fundamentally, CADA and similar laws promote and preserve individual freedom and equality, such that they enhance the very religious pluralism protected by the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Court of Appeals should be affirmed.

Dated: October 30, 2017

Respectfully Submitted,

DANIEL LAWRENCE GREENBERG
Counsel of Record

ROBERT J. WARD
HOLLY H. WEISS
JENNIFER M. OPHEIM
RANDALL ADAMS
MARK GARBYAN
BRIAN LANCIAULT
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, New York 10022
(212) 756-2000
daniel.greenberg.srz.com

Attorneys for Amicus Curiae Tanenbaum Center for Interreligious Understanding